Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

No. 90-1510

In the Supreme Court of the United States

OCTOBER TERM, 1990

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the RICO conspiracy count against petitioner was barred by the Double Jeopardy Clause because of petitioner's previous acquittal for non-RICO conspiracy.

2. Whether the court of appeals employed an incorrect standard of review in affirming the denial of petitioner's motion to dismiss the indictment on double jeopardy grounds.

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OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. A1-A8) is unreported, but the judgment is noted at 919 F.2d 147 (Table). The opinion of the district court (Pet. App. A9-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1990. A petition for rehearing was denied on February 20, 1991. The petition for a writ of certiorari was filed on March 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 10, 1989, a grand jury in the District of Nevada returned an indictment against petitioner charging him with participating in the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. 1962(c); conspiring to commit a RICO violation, in violation of 18 U.S.C. 1962(d); six counts of interstate transportation of obscene material, in violation of 18 U.S.C. 1462; and two counts of mailing obscene material, in violation of 18 U.S.C. 1461. Thereafter, petitioner moved to dismiss the RICO counts on double jeopardy grounds. The district court denied the motion, Pet. App. A9-A28, and the court of appeals affirmed, *id.* at A1-A8.

1. In the substantive and conspiracy counts under the RICO statute, the February 1989 indictment charged that, from June 1973 until the date of the indictment, petitioner and others conducted the affairs of the Talk of the Town bookstore, a so-called "adult" bookstore in Las Vegas, Nevada, with affiliates in Nevada and California, through a pattern of racketeering activity. Indictment, Count 1 ¶ 2; Count 2 ¶ 2. According to the indictment, petitioner and his co-conspirators used the bookstore to conduct a mail order business in sexually explicit films and videotapes. Count 1 ¶ 4. It was part of the conspiracy that various business operations controlled by petitioner, including Sovereign News Co. and Sundial Distributors, would supply the bookstore and its affiliates with sexually explicit material for resale, Count 1 ¶ 5; that, at the behest of petitioner, a portion of the revenues obtained through the bookstore and its affiliates would regularly be transported to Los Angeles, California, and to Cleveland, Ohio, where petitioner lived, Count 1 ¶ 8; and that the identity of the individuals who owned and operated the bookstore, including

petitioner, would be concealed through the use of nominees and fictitious persons, Count 1 ¶ 9. The RICO counts alleged the commission, from January 4, 1985, until July 23, 1987, of eight predicate acts of racketeering consisting of the interstate transportation or mailing of obscene material. Count 1 ¶ 10; Count 2 ¶ 3.

2. In 1976, petitioner was indicted in the Northern District of Ohio for conspiring with Sovereign News and others not charged in the instant indictment to violate the federal obscenity laws, in violation of 18 U.S.C. 371, and with numerous substantive obscenity offenses. The alleged conspiracy, which lasted from September 1973 to March 1976, entailed the wholesale distribution of obscene material from Sovereign News in Cleveland, Ohio, via interstate carriers and the mail. Pet. App. A11. All the overt acts charged in the 1976 indictment consisted of the shipment of obscene material to an adult bookstore in Fort Worth, Texas. Pet. 7.

At the trial on the 1976 indictment, the government introduced exhibits relating to shipments of obscene material to the Talk of the Town bookstore and other bookstores at issue in the instant indictment. Pet. App. A17. The government also introduced evidence indicating that the distribution channel used by the Cleveland conspiracy included bookstores controlled by petitioner that received their material either directly from Sovereign News or from Sovereign News's regional distributors, including Sundial Distributors in Denver. *Ibid.* After trial, petitioner was acquitted on all counts.

3. Relying on *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), petitioner moved to dismiss the RICO counts in the instant case on double jeopardy grounds. He argued that, in proving the RICO counts, the government would necessarily prove the same conspiracy of which he had previously been acquitted. The district court rejected that contention, holding that "[t]he 'conduct' at issue here is [not] the con-

spiracy the government attempted to establish in the 1978 Cleveland trial." Pet. App. A16. The court explained that during the Cleveland trial the government focused on the conspiracy between Sovereign News and the regional distributors regarding the wholesale distribution of obscene materials, and not on petitioner's involvement with retail bookstores. *Id.* at A17-A20. Accordingly, the court concluded that "[the] Cleveland conspiracy is not an essential element of this indictment, since the government does not need to prove the existence of the Cleveland conspiracy in order to convict [petitioner] in this case." *Id.* at A21-A22.

The district court further held that, even if the two indictments charged the same conspiracy under *Grady*, the Double Jeopardy Clause still would not bar the instant prosecution. Pet. App. A22-A23. The court explained that *Grady* "may be reasonably limited to situations where all of the conduct giving rise to the various criminal offenses either occurs at the same instant or is completely known to the government before it begins the initial prosecution." *Id.* at A23. The court observed that here, by contrast, none of the predicate acts had occurred and much of the evidence was not available to the government at the time of the earlier indictment and trial. *Id.* at A24. The court thus concluded that the instant indictment charges "new conduct" whose prosecution is not barred by the Double Jeopardy Clause, even if that conduct is a continuation of the previously prosecuted conspiracy. To hold otherwise, the court stated, would be to "grant [petitioner] immunity from any further conspiracy charge even though the conspiracy may in fact exist and engage in illegal activities." *Id.* at A26-A27.

4. Petitioner took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), from the denial of his motion to dismiss. The court of appeals affirmed. Pet. App. A1-A8. It concluded that the district court was not "clearly wrong" in its determination that the instant indict-

ment charges "a different agreement entered into by different conspirators with a different focus than the Cleveland conspiracy." *Id.* at A6. While acknowledging that "evidence was introduced at the Cleveland trial describing the distribution of materials to retail bookstores and indicating [petitioner] and some of his codefendants controlled a number of such bookstores," the court concluded that "the only agreement the government attempted to prove was one between [petitioner] and regional distributors of pornography." *Id.* at A7. Because of its determination that the two indictments did not charge the same "conduct" within the meaning of *Grady*, the court did not consider whether *Grady* "necessarily applies to the type of offenses charged in this indictment." *Id.* at A6 n.1.

ARGUMENT

1. Petitioner contends (Pet. 24-36, 44-50) that his previous conspiracy prosecution forecloses the instant RICO conspiracy charge under the Double Jeopardy Clause. The courts below properly rejected that claim.

a. The courts of appeals to address the issue have uniformly held that the Double Jeopardy Clause permits successive prosecutions for non-RICO conspiracy and RICO conspiracy, even when the government uses some of the same evidence concerning the defendant's actions to prove both conspiracies. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), petition for cert. pending, No. 90-7857; *United States* v. *Gambino*, 920 F.2d 1108 (2d Cir. 1990), petition for cert. pending, No. 90-1689; *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Grayson*, 795 F.2d 278, 282-283 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United*

States v. *Brooklier*, 637 F.2d 620 (9th Cir. 1981), cert. denied, 459 U.S. 1206 (1983). Cf. *Garrett* v. *United States*, 471 U.S. 773, 786, 789-790 (1985) (suggesting that complex offenses like RICO are not the "same offense" for double jeopardy purposes as their underlying predicate acts).[1] The decision of both courts below that petitioner's acquittal of a conspiracy under 18 U.S.C. 371 does not preclude later prosecution for RICO conspiracy thus comports fully with all prior federal appellate precedent.

b. Even if a non-RICO conspiracy prosecution could in some instances preclude a subsequent RICO conspiracy charge, the RICO conspiracy charge against petitioner would not be barred, because each conspiracy constituted a separate offense under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Pursuant to that test, the factors to be considered are the time periods of the conspiracies; the places where the pertinent events occurred; the persons acting as co-conspirators; the statutory offenses that were the objects of the conspiracies; and the overt acts committed in furtherance of the conspiracies. See *Marable*, 578 F.2d at 154.

Here, although the two conspiracies overlapped for a period of three years, the RICO conspiracy continued for

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[1] In *Scarpa* and *Grayson*, successive prosecutions were held permissible even though the previously adjudicated non-RICO conspiracy was specifically alleged as a predicate act in the RICO conspiracy indictment. The result in this case, in which the non-RICO conspiracy was not itself charged as a predicate act, follows *a fortiori* from *Scarpa* and *Grayson*.

13 years after the indictment for the Cleveland conspiracy, and all of the predicate acts of racketeering charged in the RICO indictment postdated the earlier indictment. The earlier conspiracy took place primarily in Cleveland, while the RICO conspiracy was centered in Las Vegas, and petitioner was the only party named in both indictments. Further, the earlier indictment charged a conspiracy to violate the obscenity laws through the wholesale distribution of obscene materials, while the RICO indictment charged a conspiracy to violate the substantive provision of the RICO statute by operating retail "adult" bookstores. Finally, there was no overlap whatever between the overt acts charged in the two indictments. On this record, there can be no doubt that the two conspiracies were not the same.

c. Quite apart from the differences for double jeopardy purposes between the two conspiracies, petitioner's successive federal prosecutions were permissible because the RICO conspiracy continued for 13 years past the date of the earlier indictment and all the predicate acts of racketeering charged against petitioner postdated that indictment. As the Court held in *Garrett*, 471 U.S. at 791-792, a defendant may be successively prosecuted where the second-charged offense was not committed until after the earlier indictment, because the earlier indictment could not have put him in jeopardy for that offense. See *id.* at 797-798 (O'Connor, J., concurring). Under petitioner's argument, a member of a conspiracy who has once been prosecuted for conspiring to commit certain offenses would obtain a lifetime grant of immunity from future prosecution for conspiring to commit the same offenses at a later date, even if he continued indefinitely to promote the commission of those criminal acts through his membership in the conspiracy.[2]

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[2] Where, as here, the first prosecution results in an acquittal, the defendant would of course be protected against future prosecutions

d. In support of his claim, petitioner relies on *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct which constitutes an offense for which the defendant already has been prosecuted." *Id.* at 2087. *Grady*, however, does not help petitioner's cause.

First, the *Grady* test has no application in the RICO context. In *Grady* the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A RICO charge, by contrast, entails proof of multiple criminal acts committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the Court stated in *Garrett*, 471 U.S. at 788, a complex offense such as RICO does not "lend itself to the simple analogy of a single course of conduct." Contrary to petitioner's contention (Pet. 47-48), the courts of appeals have found *Grady* inapplicable in RICO cases. See *United States* v. *Gonzalez*, 921 F.2d at 1535-1539; *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *United States* v. *Esposito*, 912 F.2d 60 (3d Cir. 1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1109-1111 (3d Cir. 1990), cert. denied, No. 90-1145 (May 13, 1991). But see *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (accepting government's concession on facts of that case that *Grady* barred prosecution for acts that had been charged as predicate acts in a prior RICO prosecution).

Even if the *Grady* test does apply in this context, the non-RICO and RICO conspiracies in this case did not involve

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under the doctrine of collateral estoppel of *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioner does not claim in his petition that the doctrine of collateral estoppel would bar the present prosecution.

the same conduct. As we have shown, the two prosecutions entailed separate agreements to achieve different objectives over substantially different time periods. Accordingly, both courts below correctly concluded that "the Cleveland conspiracy is not an essential element of this indictment, since the government need not prove the existence of the Cleveland conspiracy in order to convict [petitioner] in this case." Pet. App. A6, A21-A22. Although evidence was introduced at the Cleveland trial describing the distribution of materials to retail bookstores and indicating that petitioner and his co-defendants controlled a number of such bookstores, the retail distribution of obscene materials was not the conduct for which petitioner was prosecuted. Nor does the introduction of evidence regarding the Talk of the Town bookstore at the earlier trial alter the analysis. *Grady* does not bar the use of the same evidence at successive trials, as long as the two prosecutions are not for the same conduct. 110 S. Ct. at 2093.

Finally, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Gambino*, 920 F.2d at 1112-1113; *United States* v. *Scarpa*, 913 F.2d at 1013-1014 n.8; *United States* v. *Pungitore*, 910 F.2d at 1111, 1115 & n.37. As noted above, that rule was established quite clearly in *Garrett*—a case cited in *Grady* with apparent approval, see 110 S. Ct. at 2091, 2094 n.15—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the [latter] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 110 S. Ct. at 2090 n.7.[3]

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[3] Contrary to petitioner's argument (Pet. 47), *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending,

2. Petitioner contends (Pet. 37-44) that the court of appeals should have reviewed his double jeopardy claim *de novo* rather than under the "clear error" standard of review. As petitioner points out (Pet. 41-42), the courts of appeals have differed concerning the appropriate standard of review in *Abney* appeals of district court factual findings concerning whether two charged conspiracies constitute the "same offense." Compare *United States* v. *Beachner Construction Co.*, 729 F.2d 1278, 1281 (10th Cir. 1984) (clearly erroneous standard); and *United States* v. *Bendis*, 681 F.2d 561, 565-566 (9th Cir. 1981) (same), cert. denied, 459 U.S. 973 (1982); and *United States* v. *Jabara*, 644 F.2d 574, 577 (6th Cir. 1981) (same), with *United States* v. *Benefield*, 874 F.2d 1503, 1505 (11th Cir. 1989) (*de novo* standard); and *United States* v. *Ciancaglini*, 858 F.2d 923, 926 (3d Cir. 1988) (same).

All of the above cited cases involved successive conspiracy prosecutions brought under the same statute. In each instance, to determine whether the second conspiracy was the

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No. 90-1527, does not support his invocation of *Grady*. In *Calderone*, a non-RICO case, the court held that, under *Grady*, the defendants' acquittal on charges of participating in a wide-ranging, multi-drug conspiracy barred a subsequent prosecution alleging a narrower, single-drug conspiracy. However, the same court has held that *Grady* does not bar successive prosecutions for non-RICO and RICO conspiracies in circumstances similar to those of the present case. *Gambino*, 920 F.2d at 1112-1113; *Scarpa*, 913 F.2d at 1013-1014 n.8.

Nor need this case be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), petition for cert. pending, No. 90-1599. *Felix* does not involve a RICO charge, but instead concerns the permissibility of prosecution for narcotics conspiracy and substantive narcotics offenses after a prior prosecution for attempt to manufacture narcotics in which evidence relevant to the narcotics conspiracy and the substantive narcotics charges was introduced to show intent.

"same offense" as that charged in the earlier prosecution, the district court had to answer the essentially factual question whether the successive conspiracy charges were based on the same agreement. Insofar as the courts of appeals have disagreed concerning the standard of review of such district court decisions, their disagreement concerns the appropriate standard of review of such essentially factual determinations.

The appropriate standard of review in *Abney* appeals of such factual determinations is not at issue in this case, for two reasons. First, the indictment in this case charges a conspiracy offense that is different as a matter of law from that for which petitioner was indicted in 1976. As discussed above, the conspiracy charged in the current indictment continued for 13 years after the conspiracy charged in petitioner's earlier prosecution. Under settled principles reiterated in *Garrett* and *Grady*, the government is thus permitted as a matter of law to prosecute the instant conspiracy regardless of the prior prosecution.[4] See pp. 7, 9, *supra*. Second, the current indictment charges petitioner with RICO conspiracy, in violation of 18 U.S.C. 1962(d), while he was charged in his earlier prosecution with ordinary con-

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[4] In *Bendis*, *Benefield*, and *Ciancaglini*, the later indictment similarly charged a conspiracy that had not yet been completed when the defendant was indicted for the conspiracy charged in the earlier indictment. See *Bendis*, 681 F.2d at 563; *Benefield*, 874 F.2d at 1504; *Ciancaglini*, 858 F.2d at 929. Thus, although the *Garrett* principle permitting successive prosecutions where the second indictment charges a crime continuing past the date of the first indictment could have been used to decide each of those cases, the courts of appeals in those cases chose not to rely on that possible ground of decision. Instead, they chose to review the district court's factual finding concerning whether the successive conspiracy prosecutions were based on the same agreement. The standard of review question thus concerns only such district court factual findings in *Abney* appeals.

spiracy under 18 U.S.C. 371. Thus, while the above cases concern the standard of review of factual determinations whether two indictments charging violation of the same statute charge different offenses, this case involves the fundamentally different question whether an indictment charging RICO conspiracy charges a different offense from an earlier indictment charging conspiracy under 18 U.S.C. 371. As noted above, see pp. 5-6, *supra*, every court of appeals to reach the issue has rejected the claim that a RICO conspiracy is the same offense as a previously charged conspiracy under another statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20550